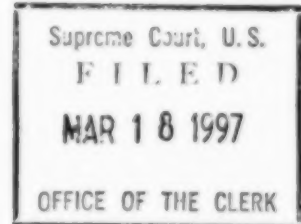


No. 96-8516

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996



KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(CORRECTED)

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33 PP
(10)

QUESTIONS PRESENTED

1. Does this Court's decision in Bailey v. United States, apply retroactively, so that a defendant who pled guilty to a charge of using a firearm in violation of 18 U.S.C. § 924(c) is entitled to collateral relief upon proof that he was not told that the facts of his case do not amount to "use" under § 924(c)?

2. Does a guilty plea waive the defendant's right to attack his conviction, where a subsequent change in the law makes the facts upon which the plea was based non-criminal?

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1996

KENNETH E. BOUSLEY,

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vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner KENNETH E. BOUSLEY respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which was entered October 3, 1996 and became final on December 18, 1996 when the Petition for Rehearing was denied.

OPINION BELOW

The Court of Appeals opinion reported at 97 F.3d 284, and is reproduced in the Appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Eighth Circuit was entered December 18, 1996 when that court denied Petitioner's timely petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the United States Constitution.

Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the following statutes:

18 U.S.C. § 924(c)(1)

[W]hoever, during and in relation to any . . . drug trafficking crime, . . . uses or carries a firearm" is subject to imprisonment for five years.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or

laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Petitioner Kenneth Bousley pled guilty in 1990 in federal court, District of Minnesota, to a charge of violating 18 U.S.C. § 924(c)(1). At the same time, he also pled guilty to a violation of 18 U.S.C. § 341(A)(1). He was sentenced on both charges at the same time, and has served the requisite time in custody on his sentence under 18 U.S.C. § 341(A)(1).

Petitioner unsuccessfully appealed his § 341(A)(1) conviction (United States v. Bousley, No. 90-5598 (8th Cir. Sept. 25, 1991)).

On July 5, 1994, Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. § 2255. The district court denied the petition, and Petitioner appealed pro se to the Eighth Circuit.

While Petitioner's appeal was pending, this Court decided Bailey v. United States, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), which changed the rule of the Eighth Circuit regarding the proper construction of 18 U.S.C. § 924(c)(1) by effectively overruling cases such as United States v. Brett, 872 F.2d 1365 (8th Cir. 1989), cert. denied 110 S.Ct. 322 (1989) and United States v. Matra, 841 F.2d 837 (8th Cir. 1988). Subsequently, present counsel was appointed to represent Petitioner and supplemental briefing was filed. Following oral argument, the district court ruling denying relief was affirmed. United States v. Bousley, 97 F.3d 284 (8th Cir. 1996).

II. STATEMENT OF FACTS

On March 19, 1990, police officers executed a search warrant at Bousley's home in Minneapolis, Minnesota. The officers found two coolers in Bousley's garage. Inside the coolers were two briefcases containing approximately seven pounds (3,153 grams) of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in Bousley's bedroom. There was no evidence that Bousley had carried or used any of these guns at any time in connection with drug trafficking.

Bousley was charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and

with use of a firearm in relation to a drug offense pursuant to 28 U.S.C. § 924(c). Bousley admitted that he had been selling methamphetamine from his garage. He also admitted knowledge of the drugs and firearms in his bedroom, as well as of the drugs found in the coffee can in the garage. Bousley disclaimed knowledge of the drugs and firearms found inside the two coolers.

Bousley entered a plea of guilty to both the drug and firearms charges. With respect to the drug charge, the plea agreement stated the following:

4. There is no limit on the term of imprisonment that the Court may impose and the defendant agrees to be sentenced in accordance with the applicable Sentencing Guidelines. The defendant understands that a mandatory minimum penalty of ten years applies to the drug offense in the event the Court finds that the relevant conduct exceeds 100 grams of methamphetamine. [citation omitted]. He further understands that a mandatory five-year consecutive sentence applies to the gun offense. There is also no agreement as to fine, supervised release, or costs. The defendant agrees to pay the \$50 special assessment.

5. Despite the fact that Count I carries a mandatory minimum penalty of ten years, the defendant is free to argue that the mandatory minimum does not apply because he did not knowingly possess more than 100 grams of methamphetamine with intent to distribute.

. . . .

The government, on the other hand, contends that the relevant conduct far exceeds the 100-gram threshold. The parties agree to allow the Court to resolve this dispute, which is a sentencing factor only, not an element of the offense.

In accordance with this agreement, the district court held an evidentiary hearing at which it received exhibits and took testimony from Bousley and FBI Special Agent Michael Kelly, who had interviewed Bousley after his arrest. Based on the hearing

and on Bousley's presentence report, the district court determined that Bousley's sentence for the drug charge would be based on the 946.9 grams of methamphetamine found in Bousley's bedroom, in the coffee can, and in one of the two briefcases in the garage. The court decided not to consider the approximately five pounds of drugs found in the second briefcase in determining the relevant conduct for which Bousley was accountable. The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to a consecutive mandatory sixty-month sentence under § 924(c) for use of the firearms in relation to the drug offense.

Bousley appealed his sentence under the drug charge and the court of appeals affirmed. United States v. Bousley, 950 F.2d 727 (8th Cir. 1991).

Subsequently, Bousley filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. § 2255. Bousley alleged in the petition (1) that his plea of guilty to the section 924(c) firearms charge was not supported by an adequate factual basis; and (2) that section 924(c) is unconstitutionally vague. The district court denied the petition, and Petitioner appealed pro se to the Eighth Circuit. Bailey, supra, was decided in the meantime.

On appeal, the Eighth Circuit affirmed, taking the position that Petitioner had "waived" his right to attack his guilty plea. The court held:

The [district] court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, he has waived the right to collateral review of his conviction. 97 F.3d at 288.

The court acknowledged that its holding was directly contrary to United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996). 97 F.3d at 288.

REASONS FOR GRANTING CERTIORARI

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN CIRCUITS REGARDING THE RETROACTIVE APPLICATION OF BAILEY

This Court's decision in Bailey v. United States, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) squarely holds that a defendant who has merely possessed guns near drugs and drug proceeds cannot be charged or convicted under 18 U.S.C. § 924(c)(1). Unresolved, however is the question whether Bailey should be applied in cases where defendants entered guilty pleas after being advised that such conduct did violate § 924(c)(1).

In United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996), the Tenth Circuit held that a defendant may collaterally attack his guilty plea if the facts he pled to are subsequently determined not to be criminal. A number of district court decisions have taken the same view; e.g., United States v. Fletcher, 919 F. Supp. 384, 387 (D. Kan. 1996). These cases rely upon this Court's holding in Blackledge v. Perry, 417 U.S. 21 (1974) for the proposition that one never waives the right to

challenge a conviction when he had the right not to be haled into court at all. Taking a similar approach is the Ninth Circuit, in United States v. McJoy, No. 95-15565, 1996 U.S. App. LEXIS 24347 (9th Cir. September 10, 1996). These cases rest on the foundation of the constitutional guarantees of due process of law and the right to be informed of the charges one faces before entering a plea.

The contrary view is reflected in the Eighth Circuit's opinion in this case. Citing United States v. Broce, 488 U.S. 563 (1989), the circuit court held that Petitioner's guilty plea waived his right to challenge the conviction despite the holding of Bailey. 97 F.3d 284, 287. This decision has been followed in district court cases such as United States v. Wallace, No. 92-00347, 1996 U.S. Dist. LEXIS 19062 (Dec. 23, 1996). These cases do not clearly address the due process concerns addressed in Blackledge, nor do they deal with the ruling announced in Broce that a guilty plea does not waive the claim that defendant's guilty plea must be based on an accurate explanation of the law in order to be valid. 488 U.S. 563, 574-75. Instead, they greatly expand the concept of waiver, adopting the opinion an ill-constructed version of the doctrine of procedural default. The analysis ignores the fact that procedural default derives from the doctrine of adequate and independent state grounds as applied in 28 U.S.C. § 2254 habeas corpus proceedings. Compare Schlup v. Delo, 115 S.Ct. 860 (1995) with the opinion below, 97 F.3d at 287-288.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNEQUAL AND INCONSISTENT APPLICATION OF THE LAW IN THE WAKE OF BAILEY

The uncertainty surrounding Bailey's application is further reflected in other district and circuit court cases. In some instances, the government has conceded that Bailey applies and entitles the petitioner to relief. See, e.g., Abreu v. United States, 922 F.Supp. 203 (E.D. Va. 1996), United States v. Barron, 940 F. Supp. 1489 (D. Alaska 1996). In others such as this one and Bell v. United States, 917 F.Supp. 618 (E.D. Mo. 1996) the government has taken the opposite view. As a result, some prisoners have been released and others permitted to withdraw their guilty pleas, while other prisoners whose conduct was virtually identical are left in prison for conduct that is not criminal.

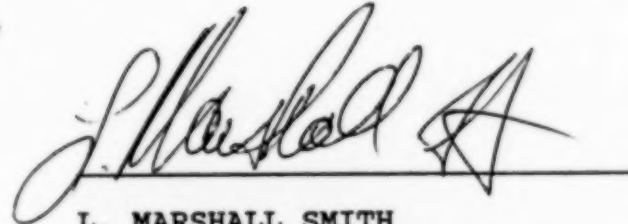
Furthermore, cases such as United States v. Andrade, 83 F.3d 729 (5th Cir. 1996) and United States v. Binford, No. 96-2419, 1997 U.S. App. LEXIS 3792 (7th Cir. March 4, 1997) decided on direct appeal have led to relief under Bailey for prisoners, while this case and others that follow it would deny relief on procedural technicalities to similarly situated petitioners seeking relief under § 2255.

The integrity of the judicial system requires that some consistency be imposed on the chaotic manner in which courts are applying the Bailey ruling. Certiorari should be granted to resolve the uncertainty and provide guidance to attorneys and district and circuit courts on these important issues.

CONCLUSION

For the reasons stated above, this petition is well taken
and should be granted.

Dated: March 18, 1997



L. MARSHALL SMITH
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

CORRECTED APPENDIX to
Petition For A Writ Of Certiorari To
The United States Court of Appeals For The Eighth Circuit

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Kenneth Eugene Bousley, Appellant, v. Joseph M. Brooks,
Warden, Appellee.
No. 95-2687

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
97 F.3d 284; 1996 U.S. App. LEXIS 26008

July 26, 1996, Submitted
October 3, 1996, Filed ✓

Rehearing Denied December 18, 1996, Reported at: <=1> 1996 U.S. App. LEXIS 33549.

PRIOR HISTORY: Appeal from the United States District Court for the District of Minnesota. CIV 5-94-87. Honorable David S. Doty.

97 F.3d 284, *; 1996 U.S. App. LEXIS 26008, **1

DISPOSITION: Affirmed.

[*286] BEAM, Circuit Judge.

Kenneth E. Bousley was convicted in 1990, upon a plea of guilty, for drug trafficking and use of a firearm in relation to a drug offense. He now appeals from the district court's n1 dismissal of his <=2> 28 U.S.C. § 2255 habeas corpus petition. We affirm.

-----Footnotes-----

n1 The Honorable David S. Doty, United States District Judge for the District of Minnesota, adopting the recommendations of the Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

-----End Footnotes-----

I. BACKGROUND

On March 19, 1990, police officers executed a search warrant at Bousley's home in Minneapolis, Minnesota. The officers found two coolers in Bousley's garage. Inside the coolers were two briefcases containing approximately seven pounds (3,153 grams) of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. [**2] A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in Bousley's bedroom.

Bousley was charged with possession of methamphetamine with intent to distribute, in violation of <=3> 21 U.S.C. § 841(a)(1), and with use of a firearm in relation to a drug offense pursuant to <=4> 28 U.S.C. § 924(c). Bousley admitted that he had been selling methamphetamine from his garage. He also admitted knowledge of the drugs and firearms in his bedroom, as well as of the drugs found in the coffee can in the garage. Bousley disclaimed knowledge of the drugs and firearms found inside the two coolers.

Bousley entered a plea of guilty to both the drug and firearms charges. The plea agreement stipulated that Bousley could challenge the amount of drugs that would be used to determine his sentence. In accordance with this agreement, the district court held an evidentiary hearing at which it received exhibits and took testimony from Bousley and FBI Special Agent Michael Kelly, who had interviewed Bousley after his arrest. Based on the hearing and on Bousley's presentence report, the district court determined that [**3] Bousley's sentence for the drug charge would be based on the 946.9 grams of methamphetamine found in Bousley's bedroom, in the coffee can, and in one of the two briefcases in the garage. The court decided not to consider the approximately five pounds of drugs found in the second briefcase in determining the relevant conduct for which Bousley was accountable. The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to a consecutive mandatory sixty-month sentence under § 924(c) for use of the firearms in relation to the drug offense.

Bousley appealed his sentence under the drug charge. This court affirmed. <=5> United States v. Bousley, 950 F.2d 727 (8th Cir. 1991). Bousley then brought this habeas corpus action pursuant to <=6> 28 U.S.C. § 2255. Bousley claims: (1) that his plea of guilty to the section 924(c) firearms charge is not supported by an adequate factual basis; and (2) that section 924(c) is unconstitutionally vague. The district court dismissed the petition and Bousley appeals. After Bousley filed his appeal, the United States Supreme Court clarified the scope of section 924(c) in <=7> Bailey v. United States, 133 L. Ed. 2d 472, 116 S. Ct. 501 [**4] (1995). Bousley then supplemented his brief, arguing that Bailey requires us to set aside his guilty plea.

[*287] II. DISCUSSION

We review the district court's dismissal of Bousley's section 2255 petition de novo. <=8> Holloway v. United States, 960 F.2d 1348, 1351 (8th Cir. 1992). In the proceedings below, the government argued that Bousley waived his right to challenge his conviction in a collateral action because he failed to preserve this issue in his prior appeal. While the district court considered the merits of Bousley's claims in dismissing the petition, we find the waiver issue

dispositive.

A. Waiver

A petitioner who fails to raise an issue on direct appeal is thereafter barred from raising that issue for the first time in a section 2255 habeas corpus proceeding. <=9> Reid v. United States, 976 F.2d 446, 447 (8th Cir. 1992), cert. denied, <=10> 507 U.S. 945, 122 L. Ed. 2d 732, 113 S. Ct. 1351 (1993) (citing <=11> United States v. Frady, 456 U.S. 152, 165, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982)). Such a waiver applies to convictions pursuant to plea agreements as well as to those rendered after trial. <=12> 976 F.2d at 448 (defendant convicted of section 924(c) violation after nolo contendere plea pursuant to a plea agreement [**5] is barred from challenging conviction in section 2255 action). A petitioner is excused from a procedural default only if he can show both (1) a cause that excuses the default, and (2) actual prejudice from the errors that are asserted. Id.

In his prior appeal, Bousley challenged only the propriety of the sentence imposed for his possession of methamphetamine. Bousley, No. 90-5598, slip op. at 1. Bousley did not appeal the adequacy of the factual basis of his guilty plea, nor did he argue that section 924(c) is unconstitutionally vague. Absent a showing of cause and prejudice, Bousley may not now bring these claims through collateral attack.

Bousley argues that he is not barred from collaterally challenging his conviction, despite his default, because of the Supreme Court's ruling in Bailey. In Bailey, the Court held that "use" of a firearm under section 924(c) requires a showing of "active employment" of the firearm, a more stringent standard than this Circuit had previously applied. <=13> Bailey, 116 S. Ct. at 505. Bousley argues that because neither he nor his counsel could have foreseen the decision in Bailey, he has not waived a challenge to his conviction. [**6]

We disagree. This court recently held in <=14> United States v. McKinney, 79 F.3d 105, 109 (8th Cir. 1996), that Bailey does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted. n2 The defendant in McKinney had been convicted after trial, rather than, as here, upon a guilty plea. <=15> Id. at 107. However, Bousley's plea cannot excuse his procedural default. Indeed, a defendant who enters a guilty plea with no conditions as to guilt "waives all challenges to the prosecution of his or her case except for those related to jurisdiction." <=16> United States v. Jennings, 12 F.3d 836, 839 (8th Cir. 1994) (citing <=17> Smith v. United States, 876 F.2d 655, 657 (8th Cir.), cert. denied, <=18> 493 U.S. 869, 110 S.

Ct. 195, 107 L. Ed. 2d 149 (1989)). Collateral review of a guilty plea is therefore "ordinarily confined to whether the underlying plea was both counseled and voluntary." <=19> United States v. Broce, 488 U.S. 563, 569, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989).

-----Footnotes-----

n2 In urging that "Bailey should be held retroactively applicable to [his section] 2255 motion," Bousley claims that McKinney "is alone in denying relief under Bailey to appellants with pending cases . . . and would set this court alone against all other courts that have addressed the issue." Supplemental Brief of Appellant at 3, 5. As an initial matter, a panel of this court is not free to disregard another panel decision. <=20> Smith v. Copeland, 87 F.3d 265, 269 (8th Cir. 1996). Even were we able to do so, Bousley's assertion is groundless. The retroactive effect of Bailey is a distinct issue from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal. This court has not hesitated to remand section 924(c) convictions for reconsideration in light of Bailey when the defendant preserved the issue by properly challenging the conviction on direct appeal. See, e.g., <=21> United States v. Webster, 84 F.3d 1056, 1066-68 (8th Cir. 1996).

-----End Footnotes-----

[**7]

As this case illustrates, a plea agreement is a process of negotiation and concession. Bousley pleaded guilty, but was afforded by stipulation in the plea agreement the opportunity [**288] to contest the amount of methamphetamine for which he would be held accountable. This concession allowed the district court to determine that it would not consider for sentencing purposes five pounds of the drugs found in Bousley's garage. We will not allow this process to be undone years after the fact, nor does Bousley cite any authority that compels us to upset the finality of such a plea agreement. n3 We are therefore convinced that procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial. n4

-----Footnotes-----

n3 Bousley argues that <=22> Davis v. United States, 417 U.S. 333, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974), compels us to reopen his plea. As counsel conceded at oral argument, however, Davis involved a conviction after a trial and a direct appeal in which the petitioner presented the same issue raised later in his section 2255 action. This is a far cry from a collateral attack of

a conviction resulting from a plea agreement. [**8]

n4 We acknowledge that the Tenth Circuit in <=23> *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996) permitted a collateral attack on a section 924(c) conviction following a guilty plea. For the reasons discussed in the text, however, we decline to follow our sister circuit on this point.

-----End Footnotes-----

As the district court noted, the record shows that Bousley acknowledged ownership of at least some of the methamphetamine and firearms found in his garage and bedroom and admitted selling drugs from his garage. Before accepting Bousley's plea, the sentencing court meticulously advised Bousley of his rights to counsel and to a jury trial, explained that he would be subject to mandatory minimum sentences, and inquired whether Bousley had been threatened or pressured to plead guilty. The court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, [**9] he has waived the right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice. <=24> *Ford v. United States*, 983 F.2d 897, 898 (8th Cir. 1993).

B. Cause and Prejudice

Bousley's only argument to excuse his default is that he received ineffective assistance of counsel during his plea and sentencing. See <=25> *United States v. Ward*, 55 F.3d 412, 413 (8th Cir. 1995) (citing <=26> *Frady*, 456 U.S. at 167-68) (ineffective assistance of counsel may constitute "cause" to excuse procedural default in a section 2255 action). Specifically, Bousley claims that his counsel failed to pursue a viable defense, was "prosecutorial" in examining him during his sentencing, refused to research existing law, and refused to honor Bousley's request to appeal his conviction under section 924(c).

We have carefully examined the record and find Bousley's arguments to be without merit. To be constitutionally deficient, counsel's performance must fall "below an objective standard of reasonableness." <=27> *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In examining whether an attorney failed to meet this standard, "a court must indulge a strong presumption [**10] that counsel's conduct falls within the wide range of reasonable professional assistance." <=28> *Id.* at 689.

Other than the generalized assertions noted above, Bousley points to no instances in which counsel failed to adequately represent him, much less that his counsel's actions fell below the constitutional minimum Strickland requires. Bousley's counsel did recommend that Bousley not pursue an appeal of his section 924(c) conviction, but that recommendation was not unreasonable given counsel's understanding of this court's interpretation of section 924(c) before Bailey. In any event, counsel fully explained his reasons for declining to appeal the conviction to Bousley, and advised Bousley that he should seek other counsel if he was determined to press that issue on appeal. These actions do not rise to a constitutionally deficient level of unreasonableness.

Because Bousley has not shown that his counsel's representation fell below an objective [**289] standard of reasonableness, he has failed to establish that he received ineffective assistance from counsel. We therefore find no cause for Bousley's procedural default, and need not examine the "prejudice" element of Bousley's claim. [**11] Bousley has waived his right to collateral review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of Bousley's petition.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2687MND

Kenneth Eugene Bousley,

Appellant,

v.

Joseph M. Brooks, Warden,

Appellee.

*
*
*
* Order Denying Petition for
* Rehearing and Suggestion
* for Rehearing En Banc
*
*

The suggestion for rehearing en banc is denied. The petition
for rehearing by the panel is also denied.

December 18, 1996 ✓

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

App. 7

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 5-94-87

Kenneth Eugene Bousley,
Reg. No. 04450-041,

Petitioner,

v.

Joseph M. Brooks, Warden,

Respondent.

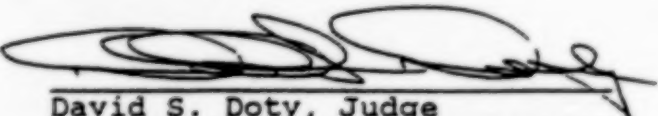
ORDER

This matter is before the court upon petitioner's objections
to a Report and Recommendation of United States Magistrate Judge
Raymond L. Erickson dated March 14, 1995. Petitioner objects to
the magistrate judge's recommendation that his Petition for a Writ
of Habeas Corpus be dismissed.

Based upon a de novo review of the record herein, the court
adopts Magistrate Judge Erickson's Report and Recommendation dated
March 14, 1995. Accordingly, IT IS HEREBY ORDERED that the
Petition for a Writ of Habeas Corpus is dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 18, 1995


David S. Doty, Judge
United States District Court

App. 8

FILED MAY 22 1995
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. MAY 22 1995
Deputy Clerk's Initials

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

* * * * *

Kenneth Eugene Bousley,
Reg. No. 04450-041,

Petitioner,

vs.

REPORT AND RECOMMENDATION

Joseph M. Brooks, Warden,

Respondent.

Civ. No. 5-94-87

* * * * *

At Duluth, in the District of Minnesota, this 14th day of
March, 1995.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(B), upon a Petition for a Writ of Habeas Corpus. The Petitioner has appeared pro se, and the Respondent has appeared by Jeffrey S. Paulsen, Assistant United States Attorney.

For reasons which follow, we recommend that the Petition for a Writ of Habeas Corpus be dismissed.

II. Procedural and Factual History

On June 15, 1990, in the United States District Court for the District of Minnesota, the Petitioner entered pleas of guilty on Counts I and II of a Superseding Indictment. In Count I, the Petitioner was charged with possessing, with an intent to distrib-

ute, methamphetamine, in violation of Title 21 U.S.C. §841(a)(1), while Count II charged him with using or carrying a firearm during and in relation to a drug trafficking offense, in violation of Title 18 U.S.C. §924(c).¹ These pleas were made during a Change of Plea Hearing.

On November 2, 1990, the District Court, the Honorable Diana E. Murphy presiding, sentenced the Petitioner to a term of 78 months for his conviction on Count I, to be followed by a consecutive sentence of 60 months for his conviction on Count II. The Petitioner is currently serving that sentence at the Federal Prison Camp at Duluth, Minnesota ("F.P.C., Duluth"). The Respondent is the Warden of that facility.

On July 5, 1994, the Petitioner filed this Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. §2241, maintaining that there was an improper factual basis for his guilty plea on Count II of the Superseding Indictment. Necessarily, we treat the

¹Title 18 U.S.C. §924(c) provides, where relevant here:

Whoever, during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *.

Petition as a Motion to Vacate a Sentence under Title 28 U.S.C. §2255.²

III. Discussion

The Petitioner does not challenge the propriety of the 78-month sentence that was entered upon his plea of guilty to the possession with intent charge. Rather, the Petitioner confines his challenge to the consecutive 60-month sentence that resulted from his plea of guilty to the charges of Count II. In this respect,

²In light of the nature of the Petitioner's challenge and the nature of the relief he requests, on July 6, 1994, we issued a Report and Recommendation that the Petition be considered as a Section 2255 proceeding, and be reassigned from District Judge Michael J. Davis, to Chief Judge Diana E. Murphy, who had imposed the Petitioner's sentence. See, Title 28 U.S.C. §2255 (prisoner claiming that sentence is subject to collateral attack may move the Court "which imposed the sentence to vacate, set aside or correct the sentence"). On July 25, 1994, our Report and Recommendation was adopted by the District Court. Accordingly, we examine the Petitioner's claims in the context of Section 2255.

In support of such an examination, we would further note that Section 2255 has long been interpreted as providing a remedy "as broad as habeas corpus," with its purpose "to afford the same rights as in habeas corpus, but with jurisdiction confined to the sentencing court." Barkan v. United States, 341 F.2d 95, 96 (10th Cir. 1965), cert. denied, 381 U.S. 940 (1965). A Writ of Habeas Corpus under Section 2241 "is not an additional, alternative, or supplemental remedy to the relief afforded by motion in the sentencing court under Section 2255" but, rather, the Section 2255 remedy "supplants that of habeas corpus and is exclusive unless it is shown that it is inadequate or ineffective to test the legality of the prisoner's detention." Id. at 95-96; see also, Hill v. United States, 368 U.S. 424, 427 (1962) (Section 2255 remedy "exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the petitioner was confined"); cf., United States v. Hayman, 342 U.S. 205, 219 (1952) ("nowhere in the [legislative] history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions"); United States v. Giddings, 740 F.2d 770, 774 (9th Cir. 1984).

the Petitioner claims that the Sentencing Court accepted his guilty plea without establishing a factual basis for that plea, in violation of Rule 11(f), Federal Rules of Criminal Procedure. Specifically, the Petitioner asserts that "the plea allocution proffered by the petitioner was insufficient, since it did not indicate [a] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." Petition Attachment, at 5.

A. Standard of Review. Rule 11(f), Federal Rules of Criminal Procedure, provides as follows:

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

For the purposes of Rule 11(f), "a factual basis for a plea of guilty is established when the court determines there is sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense." United States v. Marks, 38 F.3d 1009, 1012 (8th Cir. 1994); Gregory v. Solem, 774 F.2d 309, 312 (8th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). The Rule requires the Sentencing Court to establish "that the conduct which the defendant admits constitutes the offense charged and that the Government has evidence from which a reasonable juror could conclude that the defendant was guilty as charged." United States v. Ford, 993 F.2d 249, 253 (D.C. Cir.

1993), citing Notes of Advisory Committee, Rule 11(f), Federal Rules of Criminal Procedure, 1966 Amendment.³

B. Legal Analysis. In determining whether the Sentencing Court complied with the requisites of Rule 11(f), we must consider the nature and elements of the offense upon which the Petitioner entered his plea of guilty. In order to establish guilt, Title 18 U.S.C. §924(c) requires proof of the following two separate elements:

First, the prosecution must demonstrate that the defendant used or carried a firearm. Second, it must prove that the use or carrying was during and in relation to a drug trafficking crime.

United States v. Simms, 18 F.3d 588, 592 (8th Cir. 1994), quoting, Smith v. United States, --- U.S. ---, 113 S.Ct. 2050, 2053 (1993).

With these elements of proof in mind, we note that, at the commencement of the Change of Plea Hearing, the Court accepted a plea agreement, that the Petitioner had signed and that detailed the sentencing stipulations. Petitioner's Exhibit B, Transcript to Hearing of June 15, 1990 ("Hearing Transcript"), at 2; Government's Exhibit A, Plea Agreement and Sentencing Stipulations. Those agreed upon stipulations included the following factual basis for the Petitioner's plea:

³In fact, as long as there is a strong factual basis supporting a guilty plea, it is valid even if it is accompanied by claims of innocence -- a so-called "Alford plea." See, North Carolina v. Alford, 400 U.S. 25 (1970); White v. United States, 858 F.2d 416, 423 (8th Cir. 1988), cert. denied, 489 U.S. 1029 (1989), citing White Hawk v. Solem, 693 F.2d 825, 829 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983).

The parties also agree that, on or about March 19, 1990 * * * the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the [Petitioner]'s bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The [Petitioner] admits ownership and possession of these two guns.

The Court also heard the Petitioner's sworn admission that he had been in possession of the 6.9 grams of methamphetamine that had been seized from his bedroom, and the 33 grams that had been uncovered in a coffee can in his garage. Transcript, at 12. He also testified that he planned on selling the methamphetamine that was contained in the coffee can. Id. Further, he admitted to having been in possession of the two firearms that had been seized from his bedroom, to the fact that the guns were found in close proximity to the methamphetamine, and to the fact that one of the guns had been loaded with ammunition. Id. at 14, 16. He also unqualifiedly acknowledged that seven pounds of methamphetamine, as well as three additional weapons, had been found in the garage upon the execution of the Search Warrant on March 19, 1990. Id. at 14-15.

Although the Petitioner denied that he had ever sold methamphetamine out of his house, he admitted that, in the past, he had trafficked that substance in his garage. Transcript, at 15. He denied that he kept the guns in his bedroom in order to assist in

a drug deal, but acknowledged that the guns "were there for protection." Id. In addition, he admitted that these same weapons "were available" if he had ever needed a firearm during his previous sales of illicit drugs. Id. Nevertheless, he maintained that "they weren't right out in the open, you know, I couldn't just reach over and grab it." Id. at 16.'

Based upon our thorough review of the Record before the Sentencing Court, as well as the Transcript of the Hearing at which the plea of guilty plea to Count II was accepted, we are satisfied that the Sentencing Court had an adequate factual basis for the plea, as is required by Rule 11(f). Generally, to be used "in relation to" a drug trafficking offense, the "firearm must have some purpose or effect with respect to the drug trafficking offense," and must at least "facilitate, or have the potential of facilitating, the drug trafficking offense." Smith v. United States, supra at 2059; United States v. Hughes, 15 F.3d 798, 803 (8th Cir. 1994); United States v. Mejia, 8 F.3d 3, 5 (8th Cir. 1993).

'Also before the Court were the Receipt, Inventory and Return that had been completed by the officers who executed the Search Warrant at the Petitioner's residence on March 19, 1990. These documents corroborated his admissions by confirming that small baggies, which contained suspected methamphetamine, had been seized from a coffee can in his garage and in his master bedroom, and that two firearms -- a Walther PBK.380 caliber handgun and a .22 caliber Advantage Arms 4-shot revolver -- had been located in the same master bedroom. Petitioner's Exhibit D.

It is also well-settled in this Circuit that, in order to show that the Petitioner "used" the firearms in relation to his drug-trafficking activities, the Government need not prove that he was in actual possession of the firearm, or that he brandished or discharged it. United States v. Newton, 31 F.3d 611, 613 (8th Cir. 1994); United States v. Wolfe, 18 F.3d 634, 637 (8th Cir. 1994). Instead, ~~the Jury need only find a sufficient nexus between the gun~~ and the drug trafficking crime. United States v. Simms, supra at 592, citing United States v. Watson, 953 F.2d 406, 409 (8th Cir. 1992). Where, as here, ~~the weapon was in close proximity to the drugs and was readily accessible~~, the evidence is sufficient to support a Section 924(c) conviction. See, United States v. Horne, 4 F.3d 579, 587 (8th Cir. 1994) (use of weapon includes "presence and ready availability" of firearm at residence), cert. denied, 114 S.Ct. 1121 (1994); United States v. Jones, 23 F.3d 1407, 1409 (8th Cir. 1994); United States v. Townsley, 929 F.2d 365, 368 (8th Cir. 1991).

The Petitioner complains that the guns were kept in his bedroom, and that his drug trafficking occurred in his garage, which was a "totally separate building." Memorandum, at 3. However, to establish the necessary nexus between the gun and the drug trafficking crime, "the gun need not 'be located in the room where the drug transaction occurs.'" United States v. Simms, supra at 592, quoting United States v. Horne, supra at 587. Instead, the controlling factor is whether the placement of the weapons supports

their ready accessibility if needed in an emergency. See, United States v. Boykin, 986 F.2d 270, 274 (8th Cir. 1993), cert. denied, 114 S.Ct. 241 (1994), citing United States v. Lyman, 892 F.2d 751, 754 n. 4 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990).

In applying these precepts, we reject the Petitioner's suggestion that his garage and bedroom -- which he alleges to be about 50 feet apart -- were too far distant to allow the necessary nexus which was an essential feature of his plea agreement. While the Petitioner has claimed that the guns were kept hidden in his bedroom principally to facilitate his girlfriend's protection, we find his other admissions at the Hearing of June 15, 1990, to the contrary. For instance, he testified that these weapons were available to him during his drug trafficking activities at his residence, if and when they were needed. Compare, United States v. Boucher, 909 F.2d 1170, 1175 (8th Cir. 1990), cert. denied, 498 U.S. 942 (1990). As a consequence, even if we account for the Petitioner's admitted ambulatory limitations -- owing to his artificial leg -- the firearms he stored in his bedroom served the purpose of assuring his safety, and the security of his premises, during the conduct of his illegal drug-related activities. This is the same bedroom as to which the Petitioner admitted to have stored 6.9 grams of methamphetamine. Accordingly, this evidence is wholly sufficient to establish the close proximity and the ready accessibility, which is needed to support a Section 924(c) conviction. United States of America v. Rockelman, No. 94-2222, Slip Op. at 8

(8th Cir. March 1, 1995); United States v. Horne, supra at 587; United States v. Jones, supra at 1409; United States v. Townsley, supra at 368. Thus, the Petitioner admitted to the Sentencing Court that he maintained weapons at his residence, which facilitated his drug transactions.

As his plea agreement makes clear, the Petition admitted his ownership of the two weapons that had been seized in his bedroom, and these weapons formed the basis of his voluntary plea of guilty to the Section 924(c) charges. Therefore, because the Petitioner's testimony before the Sentencing Court established a proper factual basis for his plea, and "[b]ecause the plea agreement's description of the essential facts underlying the charges supports a finding of guilt, we hold that [the Petitioner]'s acknowledgement of the accuracy of the plea agreement's provisions satisfies Rule 11's requirement that the court establish a factual basis for the defendant's guilt." United States v. Abdullah, 947 F.2d 306, 309 (8th Cir. 1991), cert. denied, 112 S.Ct. 1969 (1992).

WHEREFORE, It is --

RECOMMENDED:

That the Petition for a Writ of Habeas Corpus be dismissed.


Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE